IN THE

Supreme Court of the United States

OCTOBER TERM, 1976

No. ~~76-726~~ 76-726

UNITED STATES OF AMERICA,
Petitioner,

vs.

EMPIRE GAS CORPORATION,
Respondent.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE EIGHTH CIRCUIT

BRIEF IN OPPOSITION

EARL A. JINKINSON
ROBERT G. FOSTER
ROBERT W. ERICSON
Suite 5000
One First National Plaza
Chicago, Illinois 60603
(312) 786-5600
Attorneys for Respondent

WINSTON & STRAWN
Suite 5000
One First National Plaza
Chicago, Illinois 60603
Of Counsel

Gunthorp-Warren Printing Company, Chicago • Financial 6-6565

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PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE EIGHTH CIRCUIT

BRIEF IN OPPOSITION

QUESTION PRESENTED

Whether, in an "attempt to monopolize" civil case under Section 2 of the Sherman Act, the government is required to prove that defendant had not only a specific intent to monopolize, but also a dangerous probability of success in monopolizing a relevant product and geographic market.

STATEMENT

A. Nature and Chronology of the Case

Respondent Empire Gas Corporation ("Empire") is a corporation organized in 1963 under the laws of the State of Missouri,

with its principal place of business in Lebanon, Missouri. (App. B, p. 32a).[1] Empire, through and in conjunction with its wholly-owned subsidiaries, is and has been principally engaged in the wholesale and retail sale of liquefied petroleum gas ("LP gas") in various states. (App. B, p. 33a). LP gas includes various gases of the methane series, principally propane and butane, which have been compressed into a liquid state. (App. B, p. 33a).

This petition stems from protracted litigation which began in early 1969 with an inquiry by the Department of Justice, followed by at least three federal grand jury investigations. (Gov. Coll. Ex. 7). On August 14, 1972 (one day before the term of the last grand jury expired), petitioner filed a civil Complaint charging Empire with violating Section 2 of the Sherman Act by attempting to monopolize the distribution and retail sale of LP gas in what petitioner later identified as 23 "local marketing areas" in Missouri and other states. More specifically, petitioner alleged that Empire had attempted to monopolize by its acquisitions, customer and territory allocations, below cost pricing, threats, price fixing, agreements not to compete and reciprocal deals. (Complaint, pp. 4-6).

On April 24, 1973, petitioner filed a motion in which it stated:

> "The Government may be required to demonstrate a specific intent . . . to monopolize a particular market as well as a dangerous probability of achieving a monopoly if the conduct undertaken were successful. Such proof will require selection of a geographic market within which such proof can be shown." (Gov. Motion, Apr. 24, 1973, p. 3).

At a pretrial conference on May 30, 1973, the Ninth Circuit's decision in *Lessig* v. *Tidewater Oil Co.*, 327 F. 2d 459 (9th Cir.

1. Parts of the record found in the Joint Appendix filed in the Court of Appeals are cited as "J. A." The Petition and its Appendix are cited as "Pet." and "App.", respectively. All other citations are in accordance with Rule 40(2).

1964) was discussed, and petitioner's lead counsel declared that he was "going to attempt to meet" the burden of proving dangerous probability in relevant markets under the Eighth Circuit's decision in *Agrashell, Inc.* v. *Hammons Products Co.*, 479 F. 2d 269 (8th Cir. 1973). (J. A. 2783a-2784a).

Petitioner then declared that its Complaint "sounds more in Section I than in Section II" (J. A. 2796a), and an Amended Complaint was filed on June 22, 1973, charging violations of both sections. The Amended Complaint merely supplemented the first filing by inserting a short paragraph regarding unnamed co-conspirators, and by adding a few lines to the introductory language in the two "charging" paragraphs. (J. A. 10a-18a).

Another pretrial conference was held on June 22, 1973. Petitioner's counsel reiterated the earlier decision "to undertake to meet the evidentiary standard required by the Eighth Circuit in *Agrashell. . . .*" and announced petitioner's intent to take a "survey." (J. A. 2798a-2799a). In response to questions from the court regarding that survey and proof of market shares, one of petitioner's attorneys stated:

> "It is our intention; we think we are going to have to put them [market shares] in, so we need additional evidence." (J. A. 2810a).

Petitioner's lead counsel also opined:

> "I think that you could—you could have a person with one percent of the market, if they had enough muscle they could threaten to take over the market and continue, if it was apparent that they had the ability and intention to do so, I think you could call that an attempt to monopolize." (J. A. 2814a).

On July 11, 1973, petitioner proposed a pretrial order which included the following subparagraph regarding its survey questionnaire:

> "5. For the purpose of assembling LP gas market share data . . .:
>
> • • •

> "(c) No later than September 10, 1973, the plaintiff shall present said questionnaire to the Court for an order permitting said questionnaire to be sent to the defendant and defendant's competitors pursuant to subpoena." (Gov. Prop. Order, July 11, 1973, pp. 1-2).

Petitioner's suggestions in support of that proposed pretrial order declared that "[i]t is essential in these cases to select commercially realistic markets and then survey the competitors selling in those markets by questionnaire." (Gov. Supp. Sugg., July 11, 1973, p. 4). The court's "PRETRIAL ORDER NO. 1," entered July 17, 1973, included verbatim petitioner's proposed subparagraph regarding submission of the survey questionnaire to the court. (Order, July 17, 1973, pp. 1-2).

Another pretrial conference was held on November 19, 1973. Again in response to a question from the court, petitioner's counsel declared that a decision had been made to reduce the number of petitioner's alleged "market areas" from 23 to 13 (J. A. 34a), and that the survey questionnaire had been mailed on November 14 to selected LP gas companies in the 13 areas. (J. A. 29a-30a). Petitioner had therefore unilaterally decided to completely ignore the court's order regarding the survey. It did not present the questionnaire to the court, did not seek or obtain a court order permitting the questionnaire to be sent out, and did not utilize the court's subpoena power to increase the likelihood of obtaining prompt and accurate responses. Petitioner's counsel simply observed:

> "[I]f the survey results come in as the defendants contend, showing that their market shares are not substantial, then we will be faced with the decision of urging, nonetheless, despite the fact that their market shares are not great, there are other ways you can violate Section 2."[2] (J. A. 65a).

2. The Eighth Circuit's decision in *Acme Precision Products, Inc.* v. *American Alloys Corp.*, 484 F. 2d 1237 (8th Cir. 1973) was also discussed at this pretrial conference. The Court of Appeals in *Acme* reaffirmed its decision in *Agrashell* and rejected the implications of *Lessig*.

B. Decisions Below

1. Trial Court

The trial court filed its decision on May 6, 1975. Precise and detailed findings of facts and conclusions of law were entered for each and every allegation in the Amended Complaint. None of petitioner's proffered evidence was excluded, and all findings were made "on the merits in regard to what . . . was established by the weight of the credible evidence." (App. B, p. 32a).

Briefly stated, the trial court found for Empire on all issues. With regard to the requirement of dangerous probability of success, the trial court specifically found:

> "[T]he undisputed data in evidence tends to establish that during the relevant time period Empire's annual retail sales of LP gas have declined, both in terms of gallons sold and dollars received, in each of plaintiff's alleged market areas, and that during the same time period Empire's 'market share' has declined in each of the alleged market areas. Other LP gas companies experienced no difficulties in entering each of the alleged market areas and many of the new entrants experienced steadily increasing retail sales and profits. Particular established LP gas companies in each of the alleged thirteen market areas had increasing retail sales, profits, and 'market shares.'" (App. B, p. 35a; *accord*, App. B, pp. 41a, 44a-45a).

The trial court also found that the uncontradicted evidence established that "intense competition generally existed at all relevant times throughout the LP gas industry and, in particular, in each of plaintiff's thirteen alleged market areas." (App. B, p. 40a).

2. Court of Appeals

Petitioner appealed to the Court of Appeals for the Eighth Circuit, but only with regard to the trial court's decisions on the Section 2 issue and on the validity of the agreements not to

compete under Section 1. (App. A, p. 2a, n. 1). The Section 2 issue was then narrowed by petitioner during oral argument to only two alleged "market areas," Lebanon and Wheaton. (App. A, p. 2a).

Citing *Agrashell*, the Court of Appeals began its decision with the proposition that "the government was required to show Empire's specific intent to monopolize and a dangerous probability of success within a relevant product and geographic market." (App. A, p. 3a). The court first found that the trial court was clearly erroneous in its findings regarding specific intent and relevant product market.[3] (App. A, pp. 10a, 14a). It then expressed substantial "misgivings about the government's method, or lack of method, of designating Wheaton and Lebanon as relevant geographic markets or submarkets." (App. A, p. 19a). Noting that the Lebanon area overlapped with another designated area, the Court of Appeals stated:

> "No reasons were given for acceptance or rejection of any of the areas, nor were the criteria used in selecting areas entered into evidence, despite repeated requests therefor by the judge. In fact, the government was unable to say who had drawn any of the lines which delineated its 13 areas." (App. A, p. 18a).

Despite such "misgivings" and a suggestion that possibly "Empire should be considered as competing within a national market area" (App. A, p. 19a), the court accepted the Lebanon and Wheaton geographic markets "for purposes of this appeal in view of the result we reach on the question of dangerous probability of success." (App. A, pp. 19a-20a).

3. Respondent submits that the Court of Appeals erred in so finding under the "clearly erroneous" standard of Rule 52(a) of the Federal Rules of Civil Procedure (Fed. R. Civ. P. 52(a)). The trial court's findings, based upon both the weight of the evidence and the credibility of the witnesses, are supported by the record. The trial court had the opportunity to view the witnesses and examine all the documents, and its findings on specific intent and relevant product market are based upon a more exhaustive review of the record and post-trial filings. *See United States* v. *Yellow Cab Co.*, 338 U. S. 338 (1949).

The Court of Appeals' consideration of the dangerous probability requirement is quite lengthy (App. A, pp. 20a-25a). In affirming the trial court on this question, it found:

> "The record shows that the LP gas business is highly competitive in the Lebanon and Wheaton markets as elsewhere. The defendant has many competitors wherever it does business, and new ones spring up frequently. The barriers to entry in this industry are minimal; all that one needed are a supply of LP, a truck, and perhaps a storage tank." (App. A, p. 20a).

Additionally, the Court of Appeals was unable to discover even one instance where any activity of Empire caused any competitor in Lebanon and Wheaton to raise or fix a price, stop soliciting Empire's customers, or decide not to enter the LP gas business. (App. A, p. 21a). It concluded:

> "Taking the evidence of dangerous probability of success as a whole . . ., we cannot find the requisite proof." (App. A, p. 25a).[4]

ARGUMENT

Introduction

The essence of petitioner's present "theory" is contained in pages 12 and 13 of its Petition. In petitioner's view, "two situations must be distinguished" in considering Section 2 attempts to monopolize. (Pet. 12). "When a defendant's conduct is not obviously anti-competitive . . . it is necessary to undertake a careful examination of the effect on the market conditions in which it takes place." (*Id.*) A court considering such conduct must therefore "examine the structure of the market involved, the defendant's actual market power, and the likelihood of its attaining a monopoly." (*Id.* at 12-13). "On the other hand, where the defendant's conduct has no redeeming competitive *virtue*,"

4. The Court of Appeals was highly critical of petitioner's "survey" and "expert testimony". (App. A, pp. 20a-22a). It also noted that many of petitioner's exhibits were unpersuasive or infected with errors. (App. A, pp. 22a-25a).

(emphasis added) or it is "socially undesirable," then "there is no need for courts to engage in refined analysis. . . ." (*Id.* at 13). In the latter situation, defendant's conduct "should be forbidden without regard to its actual effect upon competition in a particular case." (*Id.*) "[N]o additional economic analysis is necessary." (*Id.*)

In an effort to put the above theory into legally recognizable terms, petitioner contends that in a Section 2 attempt to monopolize case, courts should not require "independent proof of a dangerous probability that monopolization will be attained." (Pet. 2). Petitioner thereby purports to espouse the so-called "*Lessig* rule," which rule also rejects the need to prove a relevant product and geographic market. (*See Lessig* v. *Tidewater Oil Co.*, 327 F. 2d 459 (9th Cir. 1964)).

1. The 94th Congress Recently Rejected Petitioner's Position

Both Houses of Congress conducted an extensive examination of the antitrust laws during the 94th Congress. (*See* H. R. Rep. No. 499, 94th Cong., 2d Sess. (1976); H. R. Rep. No. 1343, 94th Cong., 2d Sess. (1976); H. R. Rep. No. 1373, 94th Cong., 2d Sess. (1976); S. Rep. No. 83, 94th Cong., 2d Sess. (1976)). As a result of that examination, comprehensive bills were introduced in both Houses—Senate Bill 1284 and House Bills 8532, 13489, and 14850. Senate Bill 1284, called the Hart-Scott Anti-Trust Bill, included the following Section:

> "SEC. 704. Section 2 of the Act entitled 'An Act to protect trade and commerce against unlawful restraints and monopolies', approved July 2, 1890 (15 U.S.C. 2), as amended, is amended by inserting at the end thereof the following new sentence: 'In any proceeding or action brought under this section alleging an attempt or conspiracy to monopolize, proof of a relevant market or of a dangerous probability of success in monopolizing any part of interstate or foreign commerce shall not be required.'" (S. 1284, *as amended*, 94th Cong., 1st Sess. § 704 (Comm. Print, 1975)).

After almost a year of careful committee consideration (*see Hearings on S. 1284 Before the Subcomm. on Antitrust and Monopoly of the Committee on the Judiciary, United States Senate*, 94th Cong., 1st and 2d Sess., pts. 1-3 (1975-76)), during which strong opposition to Section 704 was expressed (*see, e.g., id.*, at pt. 3, 201-03 (1976)), the Senate Judiciary Committee struck Section 704 from the bill it reported to the full Senate. (S. Rep. No. 83, 94th Cong., 2d Sess. (1976)). Moreover, House Bill 8532, which was finally passed by the Senate as a substitute for the Senate bill, did not include an amendment to Section 2 of the Sherman Act. *See* 90 Stats. 1383.

Thus the fact is that Congress has carefully considered, and decidedly rejected, a clear opportunity to conform the requirements of a Section 2 attempt case to petitioner's specifications. Petitioner now asks the Court to legislate in its behalf.

2. The Court Has Rejected Petitioner's Position

Petitioner claims that this Court's "pronouncements are ambiguous" regarding the need to show dangerous probability of success in a relevant market (Pet. 15). Respondent and a large number of authorities disagree.

The term "dangerous probability" was first used by this Court regarding a Section 2 attempt to monopolize in *Swift & Co.* v. *United States*, 196 U. S. 375 (1905):

> "Where acts are not sufficient in themselves to produce a result which the law seeks to prevent—for instance, the monopoly—but require further acts in addition to the mere forces of nature to bring that result to pass, an intent to bring it to pass is necessary in order to produce a dangerous probability that it will happen. [citation omitted] But when that intent and the consequent dangerous probability exist, this statute, like many others and like the common law in some cases, directs itself against that dangerous probability as well as against the completed result.
>
> * * *
>
> Not every act that may be done with intent to produce an unlawful result is unlawful, or constitutes an attempt. It is

> a question of proximity and degree. The distinction between mere preparation and attempt is well known in the criminal law. [citation omitted]" (196 U. S. at 396, 402).

Swift, of course, has been cited and quoted time and time again by courts in rejecting *Lessig*. (*See e.g., George R. Whitten, Jr., Inc.* v. *Paddock Pool Builders, Inc.*, 508 F. 2d 547, 550 (1st Cir. 1974); *Agrashell, Inc.* v. *Hammons Products Co.*, 479 F. 2d 269, 284, 287 (8th Cir. 1973); *V. & L. Cicione, Inc.* v. *C. Schmidt & Sons, Inc.*, 403 F. Supp. 643, 651, 652, n. 11 (E. D. Penn. 1975)).

Equally cited and quoted[5] regarding the dangerous probability requirement is *American Tobacco Co.* v. *United States*, 328 U. S. 781 (1946). In *American Tobacco* this Court approved a trial court instruction which included the following definition under Section 2:

> "The phrase 'attempt to monopolize' means the employment of methods, means and practices which would, if successful, accomplish monopolization, and which, though falling short, nevertheless approach so close as to create a dangerous probability of it. . . ." (328 U. S. at 785).

Curiously, petitioner neglects to mention *American Tobacco*.

A third decision, *Walker Process Equipment, Inc.* v. *Food Machinery & Chemical Corp.*, 382 U. S. 172 (1965), is considered by many to be dispositive, since it was decided after *Lessig*. (*See, e.g., Agrashell, Inc.* v. *Hammons Prods. Co.*, 479 F. 2d 269, 285, 287 (8th Cir. 1973); 2 Von Kalinowski, *Antitrust Laws and Trade Regulation*, § 9.01[2], p. 9-11 n. 32 (1976)). Specifically noting that "[t]he trial court has not analyzed any economic data," this Court in *Walker Process* reversed that lower court and held:

5. *See, e.g., Cliff Food Stores, Inc.* v. *Kroger, Inc.*, 417 F. 2d 203, 207 (5th Cir. 1969); *Sulmeyer* v. *Coca Cola Co.*, 515 F. 2d 835, 850 (5th Cir. 1975); *Kansas City Star Co.* v. *United States*, 240 F. 2d 643, 663 (8th Cir. 1957); *Agrashell, Inc.* v. *Hammons Prods. Co.*, 479 F. 2d 269, 285 (8th Cir. 1973); *Bowen* v. *New York News, Inc.*, 366 F. Supp. 651, 673 (S. D. N. Y. 1973).

> "To establish monopolization or attempt to monopolize a part of trade or commerce under § 2 of the Sherman Act, it would then be necessary to appraise the exclusionary power of the illegal patent claim in terms of the relevant market for the product involved. Without a definition of that market there is no way to measure Food Machinery's ability to lessen or destroy competition." (382 U. S. at 177).

Such language is directly contrary to petitioner's position that no regard should be given to "actual effect upon competition." (Pet. 13). *See Agrashell, Inc.* v. *Hammons Prods. Co.*, 479 F. 2d 269, 286 (8th Cir. 1973); *United States* v. *International Business Machs. Corp.*, 66 F. R. D. 180, 184 (S. D. N. Y. 1974).

3. There Is No "Conflict Among the Circuits"

Petitioner asserts that there is a "conflict among the circuits" regarding this question. (Pet. 7). A careful analysis of all the circuits indicates otherwise.

a. *Eighth Circuit*

The Court of Appeals held:

> "In order to establish an 'attempt to monopolize *** any part of the trade or commerce among the several States ***' under 15 U.S.C. § 2, the government was required to show Empire's specific intent to monopolize and a dangerous probability of success within a relevant product and geographic market." (App. A, p. 3a).

This holding comports with a long line of Eighth Circuit decisions. (*See, e.g., Kansas City Star Co.* v. *United States*, 240 F. 2d 643, 663 (8th Cir.), *rehearing denied, cert. denied*, 354 U. S. 923 (1957); *Hiland Dairy, Inc.* v. *Kroger Co.*, 402 F. 2d 968, 971, 974 (8th Cir. 1968), *cert. denied*, 395 U. S. 961 (1969); *Agrashell, Inc.* v. *Hammons Prods. Co.*, 479 F. 2d 269, 286 *et seq.* (8th Cir.), *rehearing denied, cert. denied*, 414 U. S. 1032 (1973); *Acme Precision Prods., Inc.* v. *American Alloys Corp.*, 484 F. 2d 1237, 1240 *et seq.* (8th Cir. 1973), *rehearing*

denied; Morning Pioneer, Inc. v. *Bismarck Tribune Co.*, 493 F. 2d 383, 386 (8th Cir.), *cert. denied*, 419 U. S. 836 (1974); *Morton Bldgs. of Nebraska, Inc.* v. *Morton Bldgs., Inc.*, 531 F. 2d 910, 919 (8th Cir. 1976)).

b. *Ninth Circuit*

Petitioner claims that the holding here "conflicts with the decision of the Court of Appeals for the Ninth Circuit in *Lessig* v. *Tidewater Oil Co.*, 327 F. 2d 459, *certiorari denied*, 377 U. S. 993. . . ." (Pet. 7). Respondent agrees that there is language in *Lessig* which apparently disagrees with the holding here. Respondent notes, however: (1) that this appeal was decided after the Court's decision in *Walker Process*, while *Lessig* was decided before; (2) that the discussion in *Lessig* regarding this question was *dicta*[6] (*see* 2 Von Kalinowski, *Antitrust Laws and Trade Regulation*, § 9.01[2], p. 9-11, n. 30); (3) that the *Lessig* court stated on rehearing that the part of its opinion which discussed this question "is to be read with the remainder, and in light of the anti-competitive purposes and conduct to which the case relates." (327 F. 2d at 478; *see Diamond Int'l Corp.* v. *Walterhoefer*, 289 F. Supp. 550, 575-76 (D. Md. 1968)); and (4) that the *Lessig* court did not distinguish between attempt and conspiracy cases under

6. The cases specifically discussing and rejecting *Lessig's dicta* are legion. *See, e.g., George R. Whitten, Jr., Inc.* v. *Paddock Pool Builders, Inc.*, 508 F. 2d 547, 550 (1st Cir. 1974), *cert. denied*, 421 U. S. 1004 (1975); *Coleman Motor Co.* v. *Chrysler Corp.*, 525 F. 2d 1338, 1348, n.17 (3rd Cir. 1975); *Agrashell, Inc.* v. *Hammons Prods. Co.*, 479 F. 2d 269, 287 (8th Cir.), *rehearing denied, cert. denied*, 414 U. S. 1032 (1973); *Acme Precision Prods., Inc.* v. *American Alloys Corp.*, 484 F. 2d 1237, 1240 (8th Cir. 1973), *rehearing denied; Merit Motors, Inc.* v. *Chrysler Corp.*, 417 F. Supp. 263, 269 (D. D. C. 1976); *United States* v. *Chas. Pfizer & Co.*, 245 F. Supp. 737, 738 (E. D. N. Y. 1965); *Radzik* v. *Chicagoland Recreational Vehicle Dealers, Ass'n*, 1972 Trade Cas. ¶ 74,167 (N. D. Ill. 1972); *Tire Sales Corp.* v. *Cities Service Oil Co.*, 410 F. Supp. 1222, 1230-31, n.11 (N. D. Ill. 1976); *Becker* v. *Safelite Glass Corp.*, 244 F. Supp. 625, 637 (D. Kan. 1965).

Section 2.[7] (*See* 2 Von Kalinowski, *Antitrust Laws and Trade Regulation*, § 9.01[2], p. 9-13, n. 33).

Petitioner then goes a step farther and claims that the Ninth Circuit agrees with its position, and that petitioner "would have prevailed in this case under the rule the Ninth Circuit follows." (Pet. 8). Assuming *arguendo* that petitioner's position accords with *Lessig's dicta*, a careful examination of Ninth Circuit decisions since *Lessig* indicates that there is serious question whether the Ninth Circuit has a "rule," and whether *Lessig's dicta* has been followed. (*Compare, Case-Swayne Co.* v. *Sunkist Growers, Inc.*, 369 F. 2d 449 (9th Cir. 1966), *rehearing denied, cert. denied*, 387 U. S. 932 (1967); *Jerrold Electronics Corp.* v. *Wescoast Broadcasting Co.*, 341 F. 2d 653 (9th Cir.), *rehearing denied, cert. denied*, 382 U. S. 817 (1965); *Walker Distrib. Co.* v. *Lucky Lager Brewing Co.*, 323 F. 2d 1 (9th Cir. 1963); *Independent Iron Works, Inc.* v. *United States Steel Corp.*, 322 F. 2d 656 (9th Cir.), *cert. denied*, 375 U. S. 922 (1963); *with, Hallmark Indus.* v. *Reynolds Metals Co.*, 489 F. 2d 8 (9th Cir. 1973), *rehearing denied, cert. denied*, 417 U. S. 932 (1974)). One commentator aptly concluded:

> "[T]he *Lessig* opinion has had a remarkably checkered career even in the Ninth Circuit. It is surrounded by attempt decisions, shortly before and shortly after, in which

7. The following is a typical criticism of *Lessig's dicta*:

> "The obvious flaw in the proposition put forth . . . by the dicta in *Lessig* . . ., apart from the fact that it ignores the traditional criminal law antecedents of the crime of attempt—is that it could make of every business tort an attempt to monopolize. If 'dangerous probability' of achieving monopoly power in some particular market is not a necessary element of the crime of attempted monopolization, then the only element must be the intent to monopolize. And the intent to monopolize, of course, could conceivably be inferred from virtually any hostile or even vigorous business activity. As Professor Smith observed even before the appearance on the scene of the *Lessig* dicta, the elimination of the element of 'dangerous probability' and of the relevant market from the crime of attempted monopolization would leave virtually no perimeters on the prohibitions of Section 2 of the Sherman Act." (2 Von Kalinowski, *Antitrust Laws and Trade Regulation*, § 9.01[2], p. 9-11, n.32).

> the relevant inquiry is made without any reference to the treatment of the issue in *Lessig*. Other opinions have undertaken to explain the *Lessig* doctrines, either defensively or critically. At least one opinion was initially published with an open question of the validity of *Lessig;* the reference mysteriously disappeared by the time of permanent publication in the *Federal Reporter.*" (Cooper, *Attempts and Monopolization: A Mildly Expansionary Answer to the Prophylactic Riddle of Section Two*, 72 Mich. L. Rev. 375, 420 (1974) (Footnotes omitted).

Recent decisions have likewise observed that *Lessig* "has had a shakey history in the Ninth Circuit" (*Tire Sales Corp.* v. *Cities Service Oil Co.*, 410 F. Supp. 1222, 1230-31 (N. D. Ill. 1976)), and that its present status there is "subject to some uncertainty." (*George R. Whitten, Jr., Inc.* v. *Paddock Pool Builders, Inc.*, 508 F. 2d 547, 550 (1st Cir. 1974), *cert. denied*, 421 U. S. 1004 (1975); *accord, E. J. Delaney Corp.* v. *Bonne Bell, Inc.*, 525 F. 2d 296, 305 (10th Cir. 1975), *cert. denied*, 425 U. S. 906 (1976); 2 Von Kalinowski, *Antitrust Laws and Trade Regulation*, § 9.01[2], p. 9-12, n. 32).

c. *Seventh Circuit*

Petitioner also claims that it "would have prevailed under the rule in the Seventh Circuit," citing *Kearney & Trecker Corp.* v. *Giddings & Lewis, Inc.*, 452 F. 2d 579, 598 (7th Cir. 1971), *rehearing denied, cert. denied*, 405 U. S. 1066 (1972). This claim is pure nonsense.

Kearney clearly applied the "dangerous probability" test "in the relevant market"[8] (452 F. 2d at 598-99), and it has been frequently cited by courts as rejecting *Lessig's dicta.* (*See, e.g., E. J. Delaney Corp.* v. *Bonne Bell, Inc.*, 525 F. 2d 296, 305 (10th Cir. 1975), *cert. denied*, 425 U. S. 906 (1976); *Radzik* v. *Chicagoland Recreational Vehicle Dealers, Assn.*, 1972 Trade Cas. ¶ 74,167 (N. D. Ill. 1972); *Holleb & Co.* v. *Produce*

8. The court in *Kearney* repeatedly used the term "relevant market" and twice noted that the parties had stipulated regarding the relevant product market. (452 F. 2d at 581, 597-99).

Terminal Cold Storage Co., 532 F. 2d 29, 33 (7th Cir. 1976), *rehearing denied*). Moreover, decisions before[9] and after[10] *Kearney* indicate that the Seventh Circuit applies the same standard as was applied here.[11] Justice Stevens, who wrote the *Kearney* opinion, later wrote in *Mullis* v. *Arco Petroleum Corp.*, 502 F. 2d 290 (7th Cir. 1974):

> "Whether a complaint alleges monopolization or an attempt to monopolize, it is incumbent upon the plaintiff to define the relevant market in which the defendant's actions are to be appraised. Since the statute has 'both a geographical and distributive significance' [citation omitted], the market definition must include a description of both the territory encompassed and the product involved.
>
> • • •
>
> There is no evidence that its [defendant's] share is growing, and certainly no bases for inferring any dangerous probability that it would ever approach monopoly proportions." (502 F. 2d at 295, 297).

d. *First, Fourth, Fifth and Tenth Circuits*

Petitioner concedes that the First, Fourth, Fifth and Tenth Circuits agree with the Eighth Circuit regarding this question, citing a total of five decisions (*George R. Whitten, Jr., Inc.* v. *Paddock Pool Builders, Inc.*, 508 F. 2d 547 (1st Cir. 1974),

9. *See, e.g., Bernard Foods Indus., Inc.* v. *Dietene Co.*, 415 F. 2d 1279, 1284 (7th Cir. 1969), *rehearing en banc denied, cert. denied*, 397 U. S. 912 (1970).

10. *Bendix Corp.* v. *Balax, Inc.*, 471 F. 2d 149, 161-62 (7th Cir. 1972), *rehearing and rehearing en banc denied, cert. denied*, 414 U. S. 819 (1973); *Mullis* v. *Arco Petroleum Corp.*, 502 F. 2d 290, 295, 297 (7th Cir. 1974); *Radzik* v. *Chicagoland Recreational Vehicle Dealers, Ass'n*, 1972 Trade Cas. ¶ 74,167 (N. D. Ill. 1972); *Tire Sales Corp.* v. *Cities Service Oil Co.*, 410 F. Supp. 1222, 1231 (N. D. Ill. 1976); *Holleb & Co.* v. *Produce Terminal Cold Storage Co.*, 532 F. 2d 29, 33 (7th Cir. 1976), *rehearing denied.*

11. The court in *Tire Sales Corp.* v. *Cities Service Oil Co.*, 410 F. Supp. 1222 (N. D. Ill. 1976) rejected *Lessig's dicta* and stated: "It is settled in this Circuit and others that the definition of relevant market is an essential element of an action alleging attempt to monopolize." (410 F. Supp. at 1231).

cert. denied, 421 U. S. 1004 (1975); *McElhenney Co.* v. *Western Auto Supply Co.*, 269 F. 2d 332 (4th Cir. 1959); *Cliff Food Stores, Inc.* v. *Kroger, Inc.*, 417 F. 2d 203 (5th Cir. 1969); *Yoder Bros.* v. *California-Florida Plant Corp.*, 537 F. 2d 1347 (5th Cir. 1976), *petition for cert. filed*, 45 U. S. L. W. 3432 (U. S. Dec. 14, 1976) (No. 76-766); *E. J. Delaney Corp.* v. *Bonne Bell, Inc.*, 525 F. 2d 296 (10th Cir. 1975), *cert. denied*, 425 U. S. 906 (1976)). Respondent simply adds that petitioner's list of citations is hardly exhaustive. (*See, e.g., Advance Business Sys. And Supply Co.* v. *SCM Corp.*, 415 F. 2d 55 (4th Cir. 1969), *cert. denied*, 397 U. S. 920 (1970); *Diamond Int'l Corp.* v. *Walterhoefer*, 289 F. Supp. 550 (D. Md. 1968); *Sulmeyer* v. *Coca Cola Co.*, 515 F. 2d 835 (5th Cir. 1975), *rehearing and rehearing en banc denied, cert. denied*, 424 U. S. 934 (1976); *Scranton Const. Co.* v. *Litton Indus. Leasing Corp.*, 494 F. 2d 778 (5th Cir. 1974), *rehearing and rehearing en banc denied, cert. denied*, 419 U. S. 1105 (1975); *Panotex Pipe Line Co.* v. *Phillips Petroleum Co.*, 457 F. 2d 1279 (5th Cir.), *cert. denied*, 409 U. S. 845 (1972)).

e. *All other circuits*

Petitioner is silent regarding all other circuits, leaving the impression that they have not considered the question. Yet the courts in these remaining circuits agree with the Eighth Circuit's holding in this case. (*See, e.g., Periodical Distribs., Inc.* v. *American News Co.*, 416 F. 2d 1330 (2d Cir. 1969), *aff'g*, 290 F. Supp. 896 (S. D. N. Y. 1968); *United States* v. *Chas. Pfizer & Co.*, 245 F. Supp. 737 (E. D. N. Y. 1965); *Bowen* v. *New York News, Inc.*, 366 F. Supp. 651 (S. D. N. Y. 1973); *United States* v. *International Business Machs. Corp.*, 66 F. R. D. 180 (S. D. N. Y. 1974); *Rea* v. *Ford Motor Co.*, 497 F. 2d 577 (3rd Cir.), *cert. denied*, 419 U. S. 868 (1974); *Coleman Motor Co.* v. *Chrysler Corp.*, 525 F. 2d 1338 (3rd Cir. 1975); *V. & L. Cicione, Inc.* v. *C. Schmidt & Sons, Inc.*, 403 F. Supp. 643 (E. D. Penn. 1975); *Alles Corp.* v. *Senco Prods. Inc.*, 329

F. 2d 567 (6th Cir. 1964); *Zenith Vinyl Fabrics Corp.* v. *Ford Motor Co.*, 357 F. Supp. 133 (E. D. Mich. 1973); *Oak Distrib. Co.* v. *Miller Brewing Co.*, 370 F. Supp. 889 (E. D. Mich. 1973); *Merit Motors, Inc.* v. *Chrysler Corp.*, 417 F. Supp. 263 (D. D. C. 1976)).

f. *Conclusion*

If any conflict still exists after this Court's decision in *Walker Process*, 382 U. S. 172 (1965), it is not "among the circuits," (Pet. 7), but rather within the Ninth Circuit.

4. Petitioner's Position Debors the Record

Although disclaiming any need for economic analysis or for consideration of competitive effect in a situation where a defendant's conduct is "socially undesirable" (Pet. 13), petitioner nonetheless declares that such conduct "should be forbidden" because it "*may* induce competitors to be less competitive" and "it certainly increases the chance that monopolization eventually will occur. . . ." (Pet. 11-12). (Emphasis added) The initial problem with such a declaration is that it bears no relationship whatsoever to the record in this case.[12] Both the trial and appellate courts found that the *undisputed* evidence established: (1) respondent's retail sales and market share declined in each of petitioner's alleged market areas during the relevant time period (App. B, p. 35a; *accord, United States* v. *Columbia Steel Co.*, 334 U. S. 495, 533 (1948); *Mullis* v. *Arco Petroleum Corp.*,

12. *See United States* v. *United States Steel Corp.*, 251 U. S. 417, 452 (1920) ("whatever there was of wrongful intent could not be executed.")

One commentator has suggested:

> "In short, the conclusion that the forbidden specific intent has been shown is often no more than an illustration of the common legal tendency to camouflage an uncertain evaluation of circumstances in epithetical words of improper motivation."

(Cooper, *Attempts and Monopolization: A Mildly Expansionary Answer to the Prophylactic Riddle of Section Two*, 72 Mich. L. Rev. 375, 398 (1974)).

502 F. 2d 290, 297 (7th Cir. 1974)); (2) ease of entry into the LP gas retail business (App. A, p. 20a; App. B, pp.35a, 41a, 45a; *accord, Yoder Bros.* v. *California-Florida Plant Corp.*, 537 F. 2d 1347, 1368-69 (5th Cir. 1976)); (3) new and successful entrants into each alleged market area (App. B, pp. 35a, 41a, 44a-45a; *accord, Becker* v. *Safelite Glass Corp.*, 244 F. Supp. 625, 638 (D. Kan. 1965)); (4) many competitors in each alleged market area, including substantial national companies (App. A, p. 20a; *see* Gov. Ex. 115; *accord, United States* v. *E. I. duPont de Nemours & Co.*, 351 U. S. 377, 403 (1956); *Cliff Food Stores, Inc.* v. *Kroger, Inc.*, 417 F. 2d 203, 207 (5th Cir. 1969); *Becker* v. *Safelite Glass Corp.*, 244 F. Supp. 625, 638 (D. Kan. 1965)); (5) intense competition in the industry and particularly in each of the alleged market areas (App. A, p. 20a; App. B, p. 40a; *accord, Yoder Bros.* v. *California-Florida Plant Corp.*, 537 F. 2d 1347, 1369 (5th Cir. 1976); *Cliff Food Stores, Inc.* v. *Kroger, Inc.*, 417 F. 2d 203, 207 (5th Cir. 1969)); and (6) that established competitors in each alleged market area had increasing retail sales, profits and market shares (App. B, p. 35a; *accord, United States* v. *E. I. duPont de Nemours & Co.*, 351 U. S. 377, 403 (1956); *Bendix Corp.* v. *Balax, Inc.*, 471 F. 2d 149, 164 (7th Cir. 1972)). Given such uncontradicted evidence, the result is clear under any theory of attempt to monopolize.

CONCLUSION

For the foregoing reasons, the Petition should be denied.

Respectfully submitted,

EARL A. JINKINSON
ROBERT G. FOSTER
ROBERT W. ERICSON
Suite 5000
One First National Plaza
Chicago, Illinois 60603
(312) 786-5600
Attorneys for Respondent

WINSTON & STRAWN
Suite 5000
One First National Plaza
Chicago, Illinois 60603
Of Counsel

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